87-1169
NO.

IN THE SUPREME COURT OF THE UNITED STATES

1987 - 1988 TERM

RUSSELL BEAN
Defendant/Petitioner

V.

UNITED STATES OF AMERICA
Plaintiff/Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
FROM THE SIXTH CIRCUIT COURT OF APPEALS
No. 86-6082

PETITION FOR WRIT OF CERTIORARI

RUSSELL BEAN
Defendant/Petitioner
609 Cherry Street
Chattanooga, TN 37402
(615) 267-6607

35 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Is the temporary taking of a tape recorder from an undercover person for the Government, yet that person being unknown as an agent to the defendant, theft of Government property as described in 18 U.S.C. 641.

II.

Did the Government's agents conduct constitute prosecutorial misconduct that would bar any conviction upon the basis of a bad faith prosecution.

III.

Can the defendant be acquitted by a jury based upon that jury's finding of entrapment and prosecutorial misconduct on the part of the Government in a situation and then be convicted of a charge clearly derived out of the same entrapment situation.

IV.

Why can a defendant not testify that he is innocent and raise the defense of entrapment.

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OPINION BELOW

The opinion of the Court of Appeals below, (Appendix, infra, p. A-4 - A-5) was not reported. The opinion of the District Court below (Appendix, infra, p. A-1 - A-2) was not reported. Notice of Appeal was filed (A-3).

JURISDICTION

The judgment of the Court of Appeals below (Appendix, infra, p. A-4 - A-5) was entered on October 8, 1987. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. The Fifth Amendment to the United States Constitution which provides, in pertinent part, as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime...be deprived of life, liberty, or property, or without due process of law."

2. The Fourth Amendment of the Constitution.

3. The statutes under which defendant petitioner was prosecuted, although noting herein turns upon their terms, were 18 U.S.C. Section 641, the pertinent provisions of which are as follows:

> §641. **Public money, property or records**
>
> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted - Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

STATEMENT OF THE CASE

The defendant appellant, RUSSELL BEAN, was an attorney in Chattanooga, Tennessee, and had practiced law for seventeen (17) years (Trans. 1189). He had built up a good reputation (Trans. 1165, 1173, 1179, 1480). Mike Morgan, a young attorney, became associated in the law firm with the appellant. Mike Morgan had a live-in girlfriend, Janet (Abney) Morgan, who later became Morgan's wife (Trans. 296). It was through the Morgans that the defendant BEAN first became involved with cocaine (Trans. 1193, 1205-1206).

Years later the defendant became involved in a fuss with two federal agents over a local City Court controversy. The agents were Nix and Curtis (Trans. 1271-1274, 1785-1789). Because of this controversy the agents were reprimanded by the local Attorney General's Office and their supervisor. (Trans. 1276, 1797-1819). The agents got mad at the defendant and vowed to get even (Trans. 1276-1278).

The defense contends that the agents obtained illegal information with which to prosecute him by the illegal entry of his law office (Trans. 1279, 1820-1822; 887, 1281, 1284-1286).

The appellant contends that Nix and Curtis needed more proof to indict the appellant for using cocaine so they conspired with Janet Morgan to set up meetings with the appellant with Janet Morgan having a secret tape recorder with her and to record the appellant's testimony of his past experiences years before. In return, the agents would help Mike Morgan get his fifteen (15) year jail sentence reduced (Trans. 360, 362; 1624-1625). The agents also agreed not to prosecute Janet Morgan for possession and distribution of cocaine and marijuana (Trans. 703; 314). The agents further agreed to make money payments to Janet Morgan in return for her cooperation to entrap the appellant (Trans. 665, 670-673; 929; 1316, 1320).

Janet Morgan did in fact set these meetings up. On October 17, 1985, the appellant discovered that he was being recorded (Trans. 1299-1300). The tape recorded was still running (Trans. 1302-1303). At this time Janet Morgan revealed that she did this because they had threatened to involve her (Trans. 1304; (P.T.C. 139)).

Bean took the tape, telling Morgan to wait there, he was going to listen to it and call her back (Trans. 1305).

The defendant was then indicted on six (6) counts consisting of bribery, distribution of cocaine, and theft of Government Property. The defendant was found not guilty of all counts, except Count Six which was theft of Government Property, pursuant to 18 U.S.C. 641.

ARGUMENT

QUESTION I.

The conviction of Count Six of the Indictment is based upon 18 U.S.C. 641. Congress intended for the elements of theft to be proven beyond a reasonable doubt before a conviction could stand. that essential element is that one must intentionally and knowingly convert the property in question.

Courts have consistently adhered to these principles and the law of requiring intent. Marissette v. United States (1952) 342 U.S. 246; 96 L.Ed. 288; 72 S.Ct. 240, United States v. Saunders (1952 U.S.) 6 CMR 614.

It has long been held that an honest mistake of the facts constituted a defense because criminal intent to steal or knowingly convert is an essential element of the offense of willfully and knowingly stealing and converting property of the United States. U.S. v. McComis (1952 U.S.)

In the case at bar, the appellant contends that the facts of this case just do

not constitute a theft or a criminal conversion with the necessary intent. All through the facts of this case it was evident that it was an espionage type case (Trans. 1272, 1279, 1282; 872-875, 812). The proof showed that the appellant was trying to discover if it was the Government's agents who broke into his law office (Trans. 1282, 1286-1287). On the other hand, the agents believed the appellant was taping them (Trans. 866, 1276).

The agents were countering with methods in an attempt to get back at the appellant for his revealing their scheme in the Chattanooga City Court and giving them a bad record (Trans. 1281-1282; 1285; 867, 875, 886-889, 892-894).

The appellant uncovered the recorded with the mistaken belief that it was Janet Morgan's.

Such a mistake does not formulate the necessary criminal intent or knowledge to convert. U.S. v. McComis, supra.

Appellant avers that the mere taking of the recorder was not enough to establish the

crime. U.S. v. Kemble, 197 Fed. Rep. 2nd 316 and U.S. v. Trinder, 1 F. Supp. 659.

In the Trinder case, supra, some Indians who were wards of the Government took an automobile of the Government's. While they had the vehicle they wrecked. The defense in the Trinder case, supra, was that the defendants were only taking the car for temporary local use with the intent to return it to the place or the vicinity of where it was taken where it would probably be recovered by the owner. The Trinder case, supra, held that the defendants were not guilty of stealing the automobile as there was not sufficient proof of intent to permanently deprive the owner of the property.

The case at bar is directly in point with the Trinder case. The appellant intended to listen to the tape that was in the tape recorder and then return the recorder (Trans. 1304-1305). He told Janet Abney Morgan to wait there as he might have her and her husband indicted for blackmail (Trans. 1304).

If anything, the Trinder case, supra, would have been a case involving criminal intent to convert more than the case at bar. In Trinder, the defendants did wreck the vehicle and the defendants' entire theory was they were to bring the vehicle back to the same vicinity where they had gotten it. However, the Indians abandoned the car after the wreck and the Government recovered it. In the present case, your appellant handed over the recorder when he learned it's true owner.

QUESTION II.

The appellant averred that Mike Morgan told the appellant RUSSELL BEAN that the subpoena was issued to Janet Morgan to cover up the tape recorded conversation of October 8th (Trans. 587). Agent Curtis denied this but the appellant alleges that his explanation of having the Grand Jury subpoenas issued on Janet Morgan for the purpose of protection was a sham and not for the purpose of securing her attendance at the Grand Jury (Trans. 902-903, 908). Appellant avers that the Trial Court

erred in not granting the appellant's motion for judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure (Trans. 945-946). There the Court cited a case out of the Criminal Law Reporter which is directly in point on the question of a Sham Subpoena. U.S. v. Caputo, USDC EPa 4/28/86. There the Court held that the Government's conduct in issuing a Sham Subpoena is improper and amounts to prosecutorial misconduct.

PAYMENT OF MONEY TO WITNESS AND/OR INFORMER

Appellant avers the procedures of paying Janet Morgan an amount of One Thousand Thirty-Four and 30/100 ($1,034.30) Dollars is blatant misconduct. The Government's attempted explanation of it just demonstrates their efforts to cover up its real purpose. The Government first said the cash money of One Hundred ($100.00) Dollars was paid to Janet Morgan so as to give the appearance she went to see her husband Mike in Florida (Trans. 929-930). When, on cross-examination, it was brought out that many of the payments were after the discovery of the

scheme, they then said it was to protect her. However, when asked the question why was the protection only for the weekends, they offered no explanation (Trans. 930). Cross-examination established that the payments were for Grand Jury testimony (Trans. 671-673), and to pay a phone bill (Trans. 666, 672). Upon cross-examination, Janet Morgan admitted the vouchers she signed and the money was for services rendered, not for protection (Trans. 670-671).

Such a fee arrangement between the Government and an informer whereby the latter agrees to make a case against a party in exchange for compensation to be determined after the trial on a basis of the informer's performance is condemned by a majority of the U.S. Court of Appeals as a violation of due process rights of the accused. U.S. v. Gervantes-Pacheco, 7/7/86.

The Court first condemned contingent informer fee agreements that target a particular person in Williamson v. U.S., 311 F2d 441. In Williamson the Court stated:

> "The inducement such arrangements provide for an informer to "frame" someone or to induce innocent persons to commit crimes that they had no previous intent to commit."

The Court in U.S. v. Cervantes-Pacheco, supra, in analyzing the Williamson case, supra, stated as follows:

> "Williamson prohibits the Government from picking out particular individuals for investigation and paying informants if they can implicate those suspects."

In the Cervantes-Pacheco case, supra, the Court said:

> "The government agents' actions here were clearly barred by Williamson, the majority continues. The defendant was pre-selected by the government agents for the informer's efforts. Moreover, the amount of the informer's fee depended not only upon his undercover operations but also upon the quality of his subsequent testimony. This arrangement directly tainted the fact finding process itself. Such an arrangement provided too great an incentive to give damaging testimony and therefore exclusion of the testimony was required."

The Cervantes-Pacheco case analyzed a theory that should be applied to the case at

bar as these facts would be directly in point. The Court there said:

> "The time has come to announce boldly and firmly that our judicial search for the truth cannot be reconciled with the virtual purchase of perjury."

Your appellant defendant avers that the plan or scheme itself was conduct by the agents and the Morgans not to enforce a crime but to create one.

QUESTION III.

The defendant appellant was found not guilty of the first Five Counts because of entrapment (Tech.R. Motion For New Trial, Juror's Affidavits). The appellant says such a verdict is totally inconsistent in that both Counts 1 and 2 arose out of the entrapment situation. That the tape recorder itself was a device of the entrapment. That without the illegal activities of the entrapment there would not have even been a recorder nor would the appellant have discovered the taping of appellant and that the prosecuting Government cannot benefit from it's own illegal activities.

To allow the guilty verdict to stand would be to approve of illegal activities by means of entrapment. It would be to go against the Supreme Court Rulings that deplore entrapment.

Appellant avers that this is a case of first impression on inconsistent verdicts of entrapment.

With these factors in mind, the defense refers the Court to the case of United States v. Waterman, 732 F.2d 1527 (8th Cir., 1984).

There the defendant, Waterman, was convicted of mail fraud. After the trial, he discovered evidence of an agreement between the Government and its chief witness whereby the witness was offered favorable treatment contingent upon the success of the prosecution. Waterman filed a motion to vacate, set aside or correct the sentence claiming that the agreement between the Government and the star prosecution witness against him irreparably tainted that witness' testimony depriving Waterman of the Fundamental Fairness protected

by the United States Constitution. In a stern opinion the Waterman Court held:

> "We hold that the Government's agreement with its key witness hampered the truth-finding function of the jury to a degree which cannot be reconciled with the fair procedures guaranteed by the due process clause of the Fifth Amendment."

The 8th Circuit in the Waterman case further stated:

> "This case involves not the undisclosed possibility of bias, but the disclosed encouragement and reward of bias.
> We see no place in due process law for positioning the jury to weed out the seeds of untruth planted by the Government. Certainly the witness, Gaunst, might have lied regardless of the contingency agreement and the jury was generally commissioned to determine the truth of his testimony; but that is no reason for the Government to give him further incentive to selectively remember past events in a manner favorable to the indictment or conviction of others."

Your defense would show that the case at bar is much stronger in its Government misconduct violations than the Waterman case in that the case at bar had paid witness informant and illegal activities of thefts and break ins by the Government and the hiding of a witness.

The Waterman case did however elude to these propositions and stated:

> "We are not faced with the situation of a paid informant who might be more likely to entrap a defendant because of the contingent nature of her or his compensation. See United States v. Civells, 666 F.2d 1122, 1129 (8th Cir. 1981). Nor do the facts before us resemble Government participation in illegal activity with a defendant prior to trial through undercover agents or paid informants which, although not technically entrapment, is so outrageous as to deny the defendant due process of law." See United States v. McCaghren, 66 F.2d 1227 (8th Cir. 1981). (Emphasis added)

In McCaghren, supra, the Court recognized that apart from the entrapment requirements placed upon a defendant, the governmental participation may be so outrageous or fundamentally unfair as to deprive the defendant of due process of law or to move the courts in the exercise of their supervisory jurisdiction over the administration of criminal justice to hold that the defendant was entrapped as a matter of law. The McCaghen court said:

> "A claim of entrapment on the basis of outrageous Government involvement does not present any question for the jury to decide but solely a question of law for the court."

The Supreme Court case of United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978) went even further on this principle of prosecutional misconduct. The Twigg case in reversing the defendant's conviction specifically stated that their reversal was not based upon entrapment. The defendant Twigg did not raise the issue of entrapment on appeal because the defense was not available to him. He was brought into the criminal enterprise by a man named Neville who was not a government agent. However, the Twigg Court found that the police involvement in the case was so overreaching as to bar prosecution of the defendant as a matter of due process of law.

The Twigg Court, supra, in reaching its decision cited the prior cases of Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed 113 (1976), and United States v. Russell,

459 F.2d 671 (9th Cir. 1972, and 411 U.S. 423 (1973).

The Hampton and Russell Courts had stated that some day they may be presented with a situation in which the conduct of law enforcement agents was so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction.

The Twigg Court, supra, stated that time had come. Your defense says in the case at bar that that time has come again. Your defense respectfully says that no judicial process can allow or overlook the conduct in this case of these witnesses.

The Twigg Court, supra, further cited the cases of United States v. West, 511 F.2d 1083 (3rd Cir. 1975) and United States v. Borum, 584 F.2d 424, both of which substantiated the Twigg Court principle. The Twigg Court cited one portion of the West decision that is appropriate to the charge in the case at bar of

the theft of federal property, to wit: the tape recorder:

> "The role of the government has passed the point of toleration. Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating a new crime for the sake of bringing charges against a person they had persuaded to participate in a wrongdoing." (emphasis added)

QUESTION IV.

In the Federal Sixth Circuit a defendant cannot raise the issue of entrapment when he says he is not guilty of the charge. United States v. Mitchell, 514 F.2d 758.

In the case at bar the defendant raised the issue of Entrapment on the first five counts of a six count indictment. He was found not guilty by the jury by reason of entrapment (Tech.R. Motion For New Trial, Juror's Affidavits). He could not raise the issue of entrapment on Count Six because he professed his innocence.

The defense says that such a rule as is found in the Mitchell case, supra, violates the defendant's 5th Amendment Rights. The fact that the defendant is not guilty of an offense should not prevent him from having a defense he would otherwise have if he were guilty.

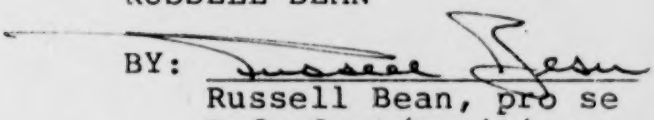
The defense also says it is unfair to allow some circuits to have a rule that allows anyone to assert the entrapment defense while others cannot. The defense is aware that this Honorable Court is about to hear the issue of entrapment, Yates v. Aiken, 290 Sup. Ct. 232, however, the defense says that the present case is a case of first impression to the United States Supreme Court. He asks that the law be made uniform where the defendant has more than one count and needs to plead differently to each count.

CONCLUSION

The defendant asks that because of entrapment, prosecutorial misconduct, and misapplication of 18 U.S.C. 641 that the charge be dismissed.

Respectfully submitted,

RUSSELL BEAN

BY: 

Russell Bean, pro se
Defendant/Petitioner
609 Cherry Street
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(615) 267-6607

IN THE SUPREME COURT OF THE UNITED STATES

1987 - 1988 TERM

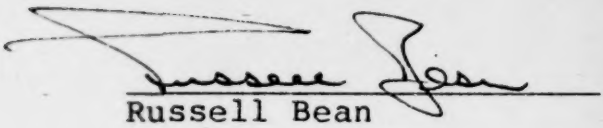
RUSSELL BEAN Defendant/Petitioner	*	
VS.	*	No.
UNITED STATES OF AMERICA Plaintiff/Respondent	*	

AFFIDAVIT OF TIMELY MAILING

I, Russell Bean, make oath that the Petition for Writ of Certiorari in the above-styled cause was deposited in a United States post office, with first-class postage prepaid, and was properly addressed to the Clerk of this Court, within the time allowed for filing, and to my knowledge, the mailing took place on the 29th day of December, 1987, within the permitted time.

I further certify that I have served the Solicitor General of the United States with three (3) copies of this petition.

This 29th day of December, 1987.



Russell Bean

Sworn to and subscribed before me

this 29th day of December, 1987.

Vicki S. Donnell

Notary Public

My Commission Expires:

December 22, 1990

APPENDIX

FILED
SEPTEMBER 29, 1986
Karl D. Saulpaw, Jr., Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

UNITED STATES OF AMERICA *

V. * Cr. 1-86-24

RUSSELL BEAN *

O R D E R

It is hereby ORDERED that defendant's request (Doc. 107) to poll the jury be, and the same hereby is, DENIED AS MOOT, the Court having already polled the jury sua sponte immediately after reading the verdict form regarding Count 6 of the Indictment on August 1, 1986. Rule 31(d), Fed.R.Crim.P.

It is further ORDERED that defendant's motion (Doc. 108) for judgment of acquittal notwithstanding the verdict, or, in the alternative, for new trial be, and the same hereby is, DENIED, the Court having reviewed each and every ground set forth in defendant's motion and having found no grounds therein for the granting of the same. Rule 33, Fed.R.Crim.P.

It is finally ORDERED that defendant's motion (Doc. 111) to interview jurors post-verdict be, and the same hereby is, GRANTED IN PART whereby the defense shall be ALLOWED to interview jurors in this matter who initiate the contact between the juror and defense counsel, and DENIED IN PART whereby the defendant or his counsel is strictly PROHIBITED from initiating any contact between them and the jurors in this matter and defense counsel is further PROHIBITED from interviewing any jurors, whether or not they initiate the conversation, if defense counsel has any matters pending in this Court which could be tried before these particular jurors.

ENTER:

S/B: James H. Jarvis
UNITED STATES
DISTRICT JUDGE

FILED
September 29, 1986
Karl D. Saulpaw, Jr., Clerk

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE

SOUTHERN DIVISION

UNITED STATES OF AMERICA

V. CR-1-86-24

RUSSELL BEAN JAMES JARVIS
District Court
Judge

NOTICE OF APPEAL

Notice is hereby given that Russell Bean appeals to the United States Court of Appeals for the Sixth Circuit from the Judgment entered in this action on September 23, 1986.

Russell Bean
Counsel for Appellant
609 Cherry Street
Chattanooga, TN 37402
(615) 756-0066

Date: September 25, 1986

FILED
October 8, 1987
John P. Hehmann, Clerk

No. 86-6082

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
V.	)	ON APPEAL FROM THE UNITED STATES
RUSSELL BEAN, Defendant-Appellant	)	DISTRICT COURT FOR THE EASTERN DISTRIC OF TENNESSEE

BEFORE: ENGEL and RYAN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

Per Curiam. Defendant Russell Bean appeals his conviction after a jury trial on one count of stealing property of the United States with a value in excess of $100, in violation of 18 U.S.C. § 641 (1982). Bean was acquitted on five other counts, including bribery, obstruction of justice, and distribution of cocaine to persons under the age of twenty-one.

Bean presents many assignments of error for our review, asserting errors in evidentiary rulings, errors in the jury instructions, selective prosecution, entrapment and other government misconduct, inconsistent verdicts, as well as insufficient evidence to support the jury's verdict. We have carefully considered each of the grounds presented and find no reversible error. Furthermore, viewing the evidence before the jury in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1940), we conclude that the jury could rationally conclude that Bean was guilty beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Gibson, 675 F.2d 825, 829 (6th Cir.), cert. denied, 459 U.S. 972 (1982).

Accordingly, we AFFIRM.

(8)

No. 87-1169

In the Supreme Court of the United States

OCTOBER TERM, 1987

RUSSELL BEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

1. Whether petitioner's theft of a government-owned tape recorder from a government informant constituted a theft of government property in violation of 18 U.S.C. 641.

2. Whether the timing of the government's issuance of a grand jury subpoena or the government's payments to an informant violated petitioner's due process rights.

3. Whether petitioner's conviction on one count must be reversed on the ground that it was inconsistent with his acquittal on two other counts.

4. Whether petitioner is entitled to a new trial because of the absence of an entrapment instruction.

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Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1169

RUSSELL BEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION

The opinion of the court of appeals (Pet. App. A4-A5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1987. The petition for a writ of certiorari was filed on December 4, 1987, but was not served on the government until January 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 23, 1986, a six-count indictment was returned in the United States District Court for the Eastern District of Tennessee charging petitioner with three counts of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); bribery of a prospective government

witness, in violation of 18 U.S.C. 201(d); obstruction of justice, in violation of 18 U.S.C. 1510; and theft of government property having a value in excess of $100, in violation of 18 U.S.C. 641. See C.A. App. 23-26.[1] Following a jury trial, petitioner was found guilty of theft of government property, but he was acquitted on the remaining counts. He was fined $500 and sentenced to a term of three years' imprisonment, all but five months and twenty-nine days of which was suspended in favor of probation (*id.* at 59). The court of appeals affirmed in a brief per curiam opinion (Pet. App. A4-A5).

2. At trial, the government established that in 1985 the Federal Bureau of Investigation was investigating allegations that petitioner and others were involved in the distribution and use of cocaine. Janet Morgan, one of the individuals allegedly involved in the drug activities, agreed to cooperate with the FBI and allowed the FBI to record several conversations she had with petitioner in person and on the telephone (C.A. App. 230). On the last of those occasions, petitioner asked Morgan whether she was recording their conversation (*id.* at 319). When she denied it, petitioner stated that he had a detection device in his pocket that indicated that she was carrying a recorder (*ibid.*). When Morgan refused petitioner's request to look into her purse, he forcibly took the purse from her and found the recorder inside (*id.* at 320). Petitioner then left with the recorder, even though Morgan told him it belonged to the FBI (*id.* at 320-321). Morgan immediately notified the FBI that petitioner had taken the recorder (*id.* at 321-322), and an FBI agent stopped petitioner's car a short time later. Upon demand, petitioner surrendered the recorder to the agent (*id.* at 780-782).

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[1] "C.A. App." refers to the Joint Appendix filed in the court of appeals.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the evidence does not support his conviction under 18 U.S.C. 641 for theft of government property because he "uncovered the recorde[r] with the mistaken belief that it [belonged to] Janet Morgan" (Pet. 7) and because he intended to return the recorder once he had listened to the tape (*id.* at 8). Petitioner's claim lacks merit on both accounts.

First, it is irrelevant whether petitioner mistakenly believed that the recorder belonged to Morgan. As the courts of appeals have consistently held, a violation of 18 U.S.C. 641 does not require knowledge that the stolen property belongs to the government. See, *e.g.*, *United States* v. *Scott*, 789 F.2d 795, 798 n.2 (9th Cir. 1986); *United States* v. *Baker*, 693 F.2d 183, 186 (D.C. Cir. 1982); *United States* v. *Speir*, 564 F.2d 934, 938 (10th Cir. 1977), cert. denied, 435 U.S. 927 (1978); *United States* v. *Jermendy*, 544 F.2d 640 (2d Cir. 1976), cert. denied, 430 U.S. 909 (1977). Cf. *United States* v. *Feola*, 420 U.S. 671 (1975).

Nor was the evidence insufficient to support the jury's conclusion that petitioner intended to deprive the government of its property permanently. The trial court properly instructed the jury that the taking must be accomplished "with intent to deprive the owner of [the property's] use or benefit, and that means permanently, as opposed to temporarily" (C.A. App. 689). The jury heard petitioner's denial that he intended to steal the recorder (see *id.* at 480-481), but it was apparently persuaded to the contrary by the evidence that petitioner forcibly took the recorder from Morgan and that he surrendered the recorder only after being stopped by a federal agent who demanded its return (see *id.* at 319-322, 780-782).

2. Petitioner also argues (Pet. 9-13) that his conviction should be reversed because the government engaged in misconduct by issuing a "sham" grand jury subpoena to Morgan and by paying her a fee contingent on the value of her cooperation in the case. There is no substance to either claim.

Contrary to petitioner's assertion, the government did not seek the issuance of a subpoena to Morgan on October 8, 1985, for the "sham" purpose of inducing petitioner to commit the bribery and obstruction of justice offenses charged in Counts 1 and 2 of the indictment. As the FBI agent testified at trial (C.A. App. 859-860), the subpoena was issued at that time to afford Morgan, who appeared as a witness before the grand jury on October 22, 1985, and again in April 1986 (see *id.* at 328, 423, 859), "some cloak of Federal protection" in the event that she was threatened or harmed (*id.* at 859-860). The subpoena was therefore issued for a proper purpose—to compel Morgan's appearance. The timing of the issuance of the subpoena served an equally proper purpose—to extend to the witness the protections of federal law. The issuance of the subpoena therefore did not constitute prosecutorial misconduct. And even if the subpoena had been issued for a "sham" purpose, petitioner would not have had any ground for relief. See *United States* v. *Martino*, 825 F.2d 754, 759-762 (3d Cir. 1987) (permissible to issue "sham" subpoena under a pseudonym to protect the identity of an undercover agent).[2]

There is likewise no merit to petitioner's claim that Morgan was improperly compensated under a contingent fee arrangement. The government established at trial that

[2] In *Martino*, the Third Circuit reversed the district court's decision in *United States* v. *Caputo*, 633 F. Supp. 1479, motion for reconsideration denied, 641 F. Supp. 378 (E.D. Pa. 1986), upon which petitioner exclusively relies (see Pet. 10).

Morgan was not paid any money contingent on her testimony. The FBI agent responsible for the payments to Morgan testified that the government paid Morgan's telephone bill and also made several $100 payments to her to pay for her security and for her travel out of town on occasions when petitioner expected her to be visiting her husband in Florida (C.A. App. 885-886). Morgan's trial testimony did not contradict that account (see *id.* at 301, 315-316, 322-323, 327-330).

In any event, petitioner mistakenly relies on the Fifth Circuit's panel decision in *United States* v. *Cervantes-Pacheco*, 800 F.2d 452 (1986), in claiming that contingent fee arrangements violate due process. The Fifth Circuit, sitting en banc, subsequently reversed that panel opinion by a vote of 12 to 2 (826 F.2d 310 (1987), and this Court recently denied certiorari in that case. See *Nelson* v. *United States*, No. 87-656 (Jan. 19, 1988). As we demonstrated in our brief in opposition in *Nelson*,[3] due process principles are in no manner violated by compensating informants for their cooperation on a contingency basis.

3. Petitioner contends (Pet. 13-19) that his conviction for theft of government property should be reversed because it is inconsistent with his acquittals on two other counts alleging bribery and obstruction of justice. In the first place, however, the jury verdicts were not inconsistent. At trial, petitioner asserted an entrapment defense to the charges of bribery and obstruction of justice, and he defended against the theft charge on the ground that he did not intend to deprive the government of its property on a permanent basis. The jury therefore could have decided that petitioner was indeed entrapped with regard

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[3] We are providing petitioner with a copy of our brief in opposition in *Nelson*.

to the bribery and obstruction of justice charges, or that he lacked the intent to commit those offenses, but that he acted with the requisite criminal intent when he took the tape recorder.

In any event, even if the verdicts were inconsistent, that would not warrant reversal. As this Court explained in *United States* v. *Powell*, 469 U.S. 57, 65-66 (1984), inconsistent verdicts are not reviewable because "inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." Contrary to petitioner's unsupported assertion (Pet. 14), there is no reason to apply a different rule when an entrapment defense is raised.[4]

4. Finally, petitioner contends (Pet. 19-20) that he should have been allowed both to deny the commission of

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[4] Neither of the two cases upon which petitioner relies (Pet. 14-19), *United States* v. *Waterman*, 732 F.2d 1527 (8th Cir. 1984), cert. denied, 471 U.S. 1065 (1985), and *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), is relevant to petitioner's inconsistent defense claim. Neither even involved a claim based on inconsistent verdicts. *Waterman* was exclusively concerned with the distinct question whether a government agreement to reward a witness based on the success of the prosecution was valid. *Twigg* addressed the issue whether the evidence produced in that case supported an entrapment defense. The panel decision in *Waterman*, moreover, was subsequently vacated by an evenly divided en banc court (see 732 F.2d at 1533), and the Third Circuit has since questioned whether *Twigg* is consistent with this Court's decision in *Hampton* v. *United States*, 425 U.S. 484 (1976). See *United States* v. *Beverly*, 723 F.2d 11, 12 (3d Cir. 1983); *United States* v. *Jannotti*, 673 F.2d 578, 610 n.17 (3d Cir.) (en banc), (concurring opinion), cert. denied, 457 U.S. 1106 (1982).

the offense and to assert the defense of entrapment. It is now settled that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Mathews* v. *United States*, No. 86-6109 (Feb. 24, 1988), slip op. 4. Petitioner, however, never requested that an entrapment instruction be given with respect to the theft charge. Nor did petitioner object to the absence of an entrapment instruction on that count at the conclusion of the district court's jury charge. See C.A. App. 650-681, 689. Hence, petitioner is entitled to relief now only if the absence of an instruction amounts to plain error that "seriously affected 'substantial rights.' " See *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985); Fed. R. Crim. P. 30.

The absence of an entrapment instruction on the theft charge in this case was not error at all, let alone plain error. A defendant seeking an entrapment instruction must adduce sufficient evidence to show that he lacked predisposition and that he was induced by the government to commit the offense (see *Mathews*, slip op. 4-5, 8). Petitioner made no such showing here; nor could he have. The evidence at trial refuted any possible argument that the government induced petitioner to steal the tape recorder and that petitioner lacked the predisposition to commit the crime. The tape recorder was hidden in Morgan's purse, where petitioner would not discover it. Petitioner used a detection device to locate the recorder and forcibly removed it from Morgan's possession. There was not the slightest suggestion in the evidence that petitioner was somehow pressured or coerced into engaging in that conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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